NO. 86-20

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ACME REFRIGERATION OF BATON ROUGE, INC.
Petitioner,

v.

WHIRLPOOL CORPORATION and HEIL-QUAKER CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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Question Presented

Whether a corporation, seeking to realize efficiency through decentralized management, may delegate pricing autonomy to a subsidiary corporation only at its peril of being held in violation of the Robinson-Patman Act if the autonomous subsidiary thereafter sells at different prices than the parent itself.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner's statement of the case omits *all* of the facts concerning the activities of respondents, Whirlpool Corporation ("Whirlpool") and its wholly-owned manufacturing subsid-

iary, Heil-Quaker Corporation ("Heil-Quaker").[1] Whirlpool manufactures major household appliances such as washing machines and refrigerators, known in the trade as "white goods," which it distributes to dealers, dealer-installers and contractors through thirteen of its own unincorporated sales divisions and through independent distributors. It does not manufacture any central heating and air conditioning equipment.

Heil-Quaker manufactures "Whirlpool" brand central heating and air conditioning equipment at its plants in Tennessee. It sells and distributes its products through a nationwide network of fifty-four distributors, or wholesalers, which resell to dealer-installers and contractors. Fifty-one of Heil-Quaker's wholesale distributors are independent third parties. Three of Whirlpool's unincorporated sales divisions also function in their respective trading areas as distributors of central heating and air conditioning equipment manufactured by Heil-Quaker.

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[1] The facts set forth herein are stated in the Court of Appeals' opinion (Appendix A to petitioner's brief), and in the affidavits in support of respondents' motion for summary judgment reproduced in part in the Appendix to this brief.

Whirlpool has no parent corporation. Whirlpool has the following non-wholly-owned subsidiaries and affiliates:

KitchenAid Limited
Aspera S.r.l.
Industria de Refrigeracao Consul S.A.
Empresa Brasileira de Compressores S.A.
Brastemp S.A. Aparelhos Domesticos E Comerciais
Brasmotor S.A.
Brastemp S.A.
Corporation for Innovation Development
Federal's Inc.
Pantry Pride, Inc.
Inglis Limited

Heil-Quaker has no non-wholly-owned subsidiaries or affiliates.

One of the Whirlpool sales divisions which acted as a Heil-Quaker distributor was the Houston Sales Division ("Whirlpool-Houston"). As a Heil-Quaker distributor, Whirlpool-Houston purchased central heating and air conditioning equipment which Heil-Quaker manufactured in Tennessee, actually took delivery at its Houston business facility, warehoused the equipment, and ultimately resold and delivered it to dealer-installers and contractors in the Houston area. Whirlpool-Houston also resold and delivered the Heil-Quaker equipment to companies operating as sub-distributors in other Texas cities and to petitioner, which operated as a sub-distributor in a thirteen-parish trading area in southwest Louisiana. Petitioner resold the equipment to dealer-installers and contractors in that area. Heil-Quaker equipment was sold in the remainder of Louisiana by two independent distributors, in New Orleans and Shreveport, which purchased and took delivery directly from Heil-Quaker in Tennessee.

In 1981, Heil-Quaker became dissatisfied with Whirlpool-Houston's performance in the large and critically important Houston metropolitan market which accounted for 11% of the national market for central air conditioning. Accordingly, it requested Whirlpool-Houston to stop selling to sub-distributors outside Houston so it could concentrate its efforts on building up sales in the Houston market. At the same time, Heil-Quaker was also dissatisfied with the sales efforts of its independent distributor in New Orleans, and its independent distributor in Shreveport was having financial difficulties. Therefore, Heil-Quaker decided to appoint a single new direct distributor which would service all of Louisiana, thereby eliminating the need for the two independent direct distributors in Shreveport and New Orleans and for petitioner as a sub-distributor of Whirlpool-Houston. Heil-Quaker appointed Solar Supply Company ("Solar") as its new direct distributor for all of Louisiana in April, 1982. However, Whirlpool-Houston did not terminate petitioner as a sub-distributor in Louisiana and petitioner

continued to buy from Whirlpool-Houston for two months after Solar was appointed.

Heil-Quaker sold to Whirlpool-Houston and all of its other fifty-three direct distributors on a national zone pricing basis. Houston and Louisiana were in the same zone and Heil-Quaker at all times sold at identical prices to its distributors in that zone. Before Heil-Quaker terminated its independent direct distributors in Shreveport and New Orleans, it sold to them and to Whirlpool-Houston at the same prices and on the same terms and conditions. After Heil-Quaker appointed Solar as its direct distributor for all of Louisiana, it sold to Solar and to Whirlpool-Houston at the same prices and on the same terms and conditions.

Whirlpool-Houston, acting as a wholesaler, received goods from Heil-Quaker and performed a warehousing and transshipment function for its sub-distributors, including petitioner. Obviously, petitioner paid Whirlpool-Houston a higher price for Heil-Quaker equipment than the direct buying distributors in the zone, including Solar, which purchased and received shipments directly from Heil-Quaker in Tennessee.

Petitioner's price discrimination claim was based upon the fact that from May, 1982 until it stopped buying from Whirlpool-Houston in July, 1982, a period of two months, it paid Whirlpool-Houston higher prices for Heil Quaker equipment than its direct-buying competitor, Solar, paid to the manufacturer, Heil-Quaker. Petitioner alleged that Heil-Quaker, as a wholly-owned subsidiary of Whirlpool, was Whirlpool's alter ego, and that Heil-Quaker's sales to its direct buying customers were therefore sales by Whirlpool. Thus, petitioner claimed that Whirlpool and Heil-Quaker were guilty of price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), because of the sales by Whirlpool-Houston to

petitioner at higher prices than those charged by its subsidiary, Heil-Quaker, to its factory direct purchaser, Solar.

Prior to trial, respondents moved for summary judgment. Respondents' affidavits, unchallenged by petitioner, established that Heil-Quaker was not the alter ego of Whirlpool, but rather that it acted independently at all times. Those affidavits showed that Heil-Quaker's distributors, including the Whirlpool sales divisions, operated on one-year contracts that were entered into, renewed or terminated solely by Heil-Quaker, without direction from Whirlpool, and that in the past Heil-Quaker had declined to renew contracts with other Whirlpool sales divisions because of their poor performance. The affidavits further showed that Heil-Quaker set its own prices, terms and conditions of sale with no participation by Whirlpool and that Whirlpool-Houston likewise set its own prices, terms and conditions of sale with no participation by Heil-Quaker. The trial court nevertheless held that there was a question of fact on the issue of whether there was control by the parent, Whirlpool, of its subsidiary, Heil-Quaker, and it denied summary judgment.

The Fifth Circuit, reversing after a trial and judgment for petitioner, held that the trial court should have granted summary judgment in favor of respondents because there was no issue of fact as to control. The court found that respondents had established, as a matter of law, that Whirlpool did not actively control Heil-Quaker or the terms of its sales, so that Heil-Quaker and Whirlpool-Houston were not the same seller. Hence, there was no price discrimination on Heil-Quaker's sales to Solar, as a direct-buying distributor, and Whirlpool-Houston's sales to petitioner, as a sub-distributor. *Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool Corp.*, 785 F.2d 1240, 1243-44 (5th Cir.), *reh. denied,* 785 F.2d 1245 (5th Cir.), *pet. for cert. filed,* No. 86-20 (July 10, 1986).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

SUMMARY OF ARGUMENT

Respondents oppose the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The decision below does not conflict with prior decisions of the Fifth Circuit or of other Circuits. It fully comports with this Court's admonition against too facile application of *per se* rules. It avoids an application of the Robinson-Patman Act which would effectively outlaw decentralized management of sales and marketing, thereby depriving consumers of the benefits of the efficiencies which flow from decentralization, and promoting the very price rigidity which is antithetical to the real policies of the antitrust laws.

ARGUMENT

The gist of the Petition is the complaint that the lower federal courts have not applied a universal *per se* rule in *all* Robinson-Patman cases mandating disregard of the separate existence of a corporation and its autonomous subsidiary corporation without regard to the facts of the case. Petitioner asks this Court to formulate such a universal *per se* rule in the interest of "uniformity."

Respondents suggest that the lower courts' failure to develop a *per se* rule of universal applicability does not call for intervention by this Court. Such failure reflects the fact that a universally applicable *per se* rule would be inappropriate. Indeed, this Court has cautioned against too facile application of *per se* rules, *e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50, nn.15,16 (1977); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8-9 (1979).

Moreover, the decision of the Court of Appeals in this case does not, contrary to Petitioner's claims, conflict with its own prior decision in *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979), nor with the Sixth Circuit's decision in *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214 (6th Cir. 1985). Those decisions both rejected claims that a corporate seller had discriminated in price *by selling to its own subsidiary* at a lower price than the parent charged to a plaintiff which competed with the allegedly "favored" subsidiary. As stated by the Fifth Circuit in *Security Tire*, 598 F.2d at 965:

> We hold that transfers from a parent corporation to its wholly-owned subsidiary corporation *can never be considered* separate *sales to a favored customer* in a Robinson-Patman Act discrimination suit. (emphasis supplied)

The court reasoned (598 F.2d at 966) that a sale by a parent to its own wholly-owned subsidiary is the economic equivalent of an intra-company transfer of goods and, as such, cannot be considered a "sale" for Robinson-Patman purposes.

Russ' Kwik followed *Security Tire*, adopting what the Sixth Circuit described as "the per se rule of *Security Tire*" (772 F.2d at 220). Noting this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Sixth Circuit observed that a parent and its subsidiary are a single economic unit and held that the Robinson-Patman Act is not concerned with transfers between them. It therefore affirmed a summary judgment which had dismissed a claim of price discrimination against Marathon Petroleum Co. which had allegedly "sold" to its own subsidiary at lower prices than it charged the plaintiff which competed with the subsidiary.

The instant case does not present the same issue which concerned the Fifth and Sixth Circuits in *Security Tire* and *Russ' Kwik*. This case simply does not concern the "price" at which goods are transferred between a parent and its subsid-

iary. Unlike *Security Tire* and *Russ' Kwik,* there is no claim here that Heil-Quaker extended prices to Whirlpool which were discriminatory or otherwise unlawful, and the holdings of *Security Tire* and *Russ' Kwik* are therefore inapposite.

Unlike those cases, the claim here is that both defendants violated the Robinson-Patman Act because Heil-Quaker sold to a third party, Solar, at lower prices than those at which Whirlpool-Houston sold to petitioner Acme. This claim rests on the assertion that Heil-Quaker's undisputed separate legal existence must be disregarded and that its complete management autonomy, which the Court of Appeals held had been established by uncontroverted evidence, must be ignored, in order to hold that the two corporations are the "same" seller and therefore violated the Robinson-Patman Act by selling at different prices. The basis on which Whirlpool-Houston obtained products from Heil-Quaker, and whether those transactions are "sales," are irrelevant to the issue in this case—whether the two separate corporations, separately managed but commonly owned, are the same seller.

In *Copperweld, supra,* this court held that a parent and its subsidiary are incapable of conspiring with each other for purposes of § 1 of the Sherman Act reasoning, *inter alia,* that a parent and its subsidiary, by "agreeing" upon a common course of action, do not thereby join economic resources which had previously served separate interests. The Court explored the policies behind the basic Sherman Act dichotomy between unilateral and concerted action and observed that consumers are often thought to benefit from efficiencies created by decentralized management, cautioning against woodenly discouraging corporations from delegating responsibility to autonomous units.

The Court of Appeals decision in this case comports fully with that admonition in *Copperweld.* Indeed, decentralized management of sales and marketing could hardly be con-

templated, let alone exist, if petitioner's position were adopted and commonly owned but autonomous corporations could charge different prices only at the peril of Robinson-Patman treble damage suits. Any fears about Robinson-Patman abuse by corporations setting up sham subsidiaries can be adequately policed by well established antitrust doctrines such as the "indirect purchaser" doctrine, a concept implicit in the Fifth Circuit's decision and its per curiam opinion denying Acme's petition for rehearing. See Appendix A and B to the Petition. See also, *American News Co. v. FTC,* 300 F.2d 104, 109-10 (2d Cir. 1962), *cert. denied,* 371 U.S. 824 (1962); *Purolator Products, Inc. v. FTC,* 352 F.2d 874, 883 (7th Cir. 1965), *cert. denied,* 389 U.S. 1045 (1968); *Hiram Walker, Inc. v. A & S Tropical, Inc.,* 407 F.2d 4, 8 (5th Cir. 1969), *cert. denied,* 396 U.S. 901 (1969); *Barnosky Oils, Inc. v. Union Oil Co.,* 665 F.2d 74, 83-84 (6th Cir. 1981). Clearly, the "indirect purchaser" doctrine seems to have been the thrust of Petitioner's "alter ego" claim which failed for lack of any evidence to support it.

Rather than conflicting with this Court's precedents, the Court of Appeals' decision in this case effectuated the long-standing admonition that overly simplified Robinson-Patman enforcement is to be avoided, lest it give rise to price uniformity and rigidity in conflict with the purpose of other antitrust legislation. *Automatic Canteen Co. v. Federal Trade Commission,* 346 U.S. 61, 63 (1953); *Great Atlantic & Pacific Tea Company, Inc. v. Federal Trade Commission,* 440 U.S. 69, 80 and n. 13, (1979).

Nor does the decision below have apparent significance extending beyond the interests of the immediate parties to this suit. The major policy debate regarding the application of Robinson-Patman to intra-enterprise transfers has been, as in *Security Tire* and *Russ' Kwik,* whether the price of an intra firm transfer between parent and subsidiary can be compared to a price or sale to an independent purchaser which competes with the subsidiary. See, A.B.A. Section of Antitrust Law, Mono-

graph 4, "The Robinson-Patman Act: Policy and Law," Vol. 1 at 48-50. That is not the issue here.

In this case the Court of Appeals held that sales to unrelated third parties by a parent and its wholly-owned subsidiary corporation are not made by the "same" seller for Robinson-Patman purposes where the subsidiary enjoys pricing autonomy under a scheme of decentralized management. This holding avoids needlessly outlawing decentralized management and depriving consumers of its benefits, avoids a construction or application of the Robinson-Patman Act which would promote price uniformity and rigidity in conflict with the purpose of other antitrust legislation, does not involve an issue which has recurred frequently in recent litigation, and does not conflict with prior decisions of this Court or of other Circuits. The case only involves alleged price discrimination in thirteen parishes of Louisiana which lasted for two months.

CONCLUSION

Review of the Court of Appeals' decision is not required, and the Petition should be denied.

Respectfully submitted,

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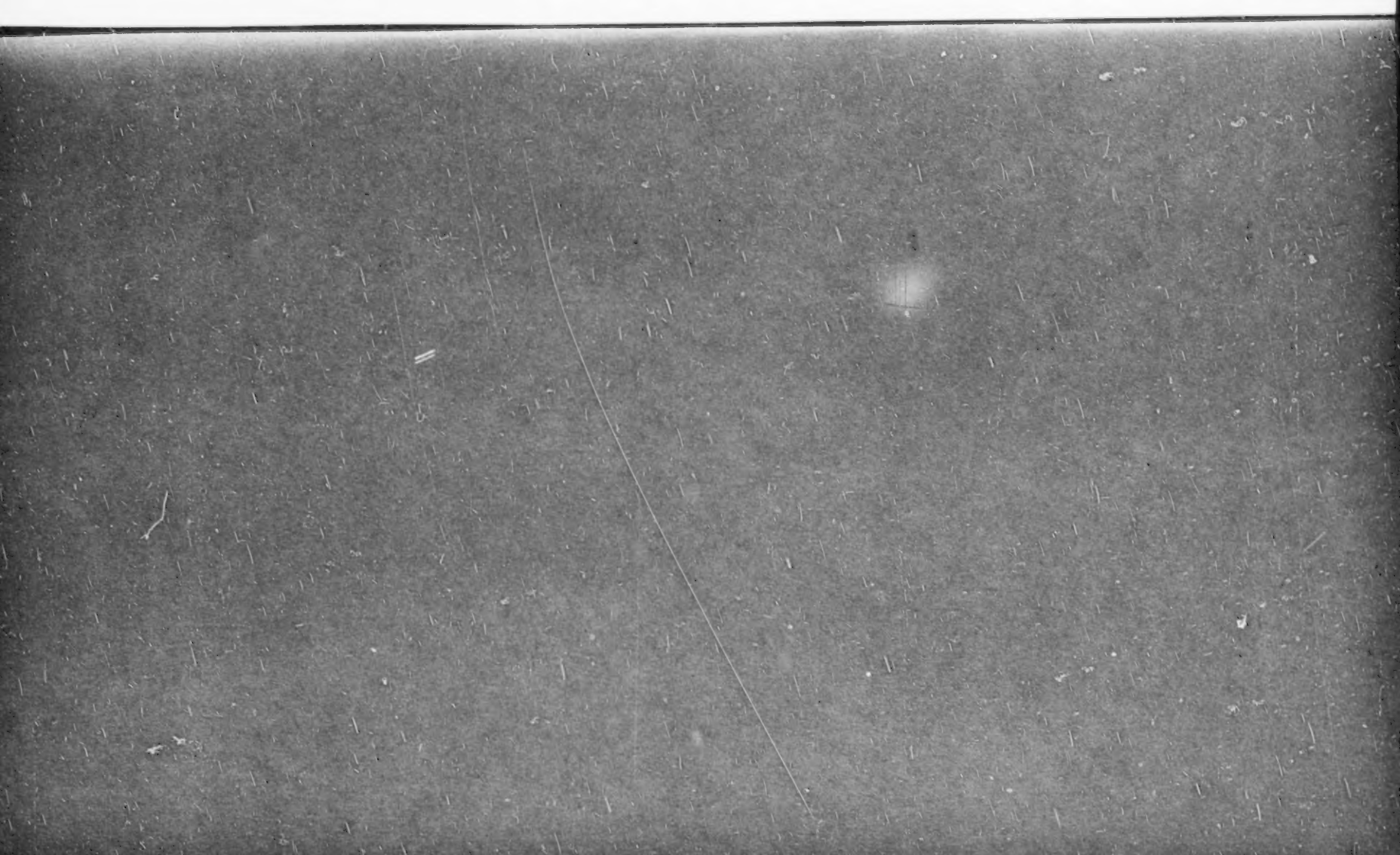
APPENDIX



AFFIDAVIT OF CHARLES L. SHATTUCK

Charles L. Shattuck, being first duly sworn on oath, deposes and says:

1. Affiant has been employed by Heil-Quaker Corporation since 1969, has been Vice President—Marketing of this corporation since 1979 and has personal knowledge of the matters stated in this affidavit. As Vice President—Marketing, affiant reports to Charles H. Findley, President and Chief Executive Officer of Heil-Quaker. Mr. Findley is neither an officer nor a director of Whirlpool Corporation. No officer reporting to Mr. Findley nor any other employee of Heil-Quaker is compensated by Whirlpool.

2. Heil-Quaker is a Delaware corporation and is a wholly-owned subsidiary of Whirlpool Corporation, a Delaware corporation. Heil-Quaker is in the business of manufacturing central heating and cooling equipment for sale under various brand names including the "Whirlpool" brand. Heil-Quaker manufactures this equipment at two plants located at LaVergne and Lewisburg, Tennessee. It owns both plants. Whirlpool Corporation is in the business of manufacturing major household appliances (white goods) and does not manufacture central heating and cooling equipment. Heil-Quaker does not manufacture white goods.

3. Heil-Quaker sells Whirlpool brand central heating and cooling equipment through a distribution system currently consisting of fifty-four (54) distributors. These fifty-four distributors cover most areas of the United States. Heil-Quaker, as a manufacturer, sells the Whirlpool brand only to these fifty-four distributors and does not sell the Whirlpool brand in competition with any of them.

4. Fifty-one (51) of Heil-Quaker's distributors of Whirlpool brand central heating and cooling equipment

are independent entities which have no corporate or ownership relationship with Heil-Quaker, Whirlpool or any parent or subsidiary corporation of either of them. Three of Heil-Quaker's distributors of Whirlpool brand central heating and cooling equipment are Sales Divisions of Whirlpool Corporation. These Sales Divisions are located in Houston, Texas, Charlotte, North Carolina, and Kansas City, Missouri. These Sales Divisions also resell Whirlpool brand major household appliances (white goods) which are manufactured by Whirlpool Corporation. Whirlpool Corporation has ten other Sales Divisions located throughout the country, none of which distributes Whirlpool brand central heating and cooling equipment. In all of these areas, Heil-Quaker sells Whirlpool brand central heating and cooling equipment to independent distributors.

5. All of Heil-Quaker's distributors of Whirlpool brand central heating and cooling equipment are appointed for terms not exceeding one year under a standard form of contract negotiated on behalf of Heil-Quaker by its Zone Sales Managers James Hobbs (Southern Zone) and Kenneth Shinnick (Northern Zone) and executed by its President. These contracts are approved by Messrs. Hobbs' and Shinnick's immediate superior, Heil-Quaker's National Sales Manager, Arthur Mehuron, and by affiant, Mr. Mehuron's immediate superior. Messrs. Hobbs, Shinnick, Mehuron and affiant also have sole authority to renew, non-renew or terminate existing distributors of Whirlpool brand central heating and cooling equipment. These contracts do not limit or restrict the territory in which the distributors may resell Whirlpool brand.

6. Whirlpool Corporation is never consulted and does not participate in the decisions made to appoint, renew, non-renew or terminate Heil-Quaker's distributors of Whirlpool brand central heating and cooling equipment.

Heil-Quaker management has been instructed by Herbert K. Anspach, Chairman of the Board of Heil-Quaker, and also President of Whirlpool, that Heil-Quaker has total autonomy and authority to make such decisions and that such decisions are to be made solely on the basis of Heil-Quaker management's evaluation of marketing considerations which maximize the overall profitability of Heil-Quaker in the judgment of Heil-Quaker's management.

7. Heil-Quaker has appointed local Whirlpool Sales Divisions as distributors of Whirlpool brand central heating and cooling equipment only in circumstances where, in the judgment of Heil-Quaker management, those sales divisions presented the best available means for distributing such equipment. In particular, Heil-Quaker did not renew its distributorship agreement with Whirlpool's Northern California Sales Division effective as of July 1980 when Heil-Quaker management determined that the Northern California Sales Division was not doing an adequate job of distributing said equipment. An independent corporation, Pameco Aire, was appointed in its place and continues as the distributor of said equipment for Northern California. In 1982, Heil-Quaker had under consideration the appointment of Whirlpool's Dallas Sales Division as a distributor of Whirlpool central brand heating and cooling equipment in the Dallas Metropolitan Area, but instead appointed an independent corporation, Climate Supply Co., as its distributor for the year 1983 because, in the judgment of Heil-Quaker management, Climate Supply Co. would do a more satisfactory job of distribution. During 1981, Heil-Quaker management considered not renewing the Houston Sales Division because of its unsatisfactory market penetration in the Houston metropolitan area, its area of primary responsibility, but decided instead to encourage it to concentrate its efforts on the Houston market. In prior years, Heil-Quaker has not

renewed distributorship agreements with Whirlpool Sales Divisions in Miami, Chicago, Dallas, and Detroit.

8. Heil-Quaker's prices, terms and conditions of sale to its distributors for Whirlpool brand central heating and cooling equipment are determined and established solely by Heil-Quaker personnel. Heil-Quaker's distributor prices are initially determined by its National Merchandise Manager, Frank Hartman, with the approval of its Vice President—Finance, Richard G. Marquardt. Mr. Hartman determines Heil-Quaker's total costs of manufacture and other distribution and sales costs per product, and adds to these costs a desired gross profit margin for each product. These distributor prices (total of all costs plus a gross profit margin) are then furnished to affiant, and Heil-Quaker's National Sales Manager and Zone Sales Managers. Each Zone Sales Manager determines the appropriate prices for geographic zones within his area of responsibility, taking into consideration the particular competitive conditions within each zone. For example, in Zone 15 (the State of Texas and Western Louisiana), Zone Sales Manager James Hobbs determines a uniform discount from the distributor price with the approval of affiant and Mr. Mehuron for all products within Zone 15. These uniformly discounted prices are the sales prices for all distributors within Zone 15. Thus, the Houston Sales Division is within Zone 15 and it pays the same price for Whirlpool brand central heating and cooling equipment as Heil-Quaker's other distributors which are located within this zone. The Houston Sales Division and Solar Supply Company, both within Zone 15, paid Heil-Quaker the same prices in 1982 for the same products they purchased from it. . . . .

9. Whirlpool Corporation is never consulted and does not participate in any way in any part of the process of Heil-Quaker's decision-making when it sets its prices,

terms and conditions of sale to its distributors of Whirlpool brand central heating and cooling equipment. Heil-Quaker management has been instructed by Mr. Anspach that Heil-Quaker has total autonomy and authority for establishing such prices and its decisions are to be made strictly on the basis of Heil-Quaker management's evaluation of marketing conditions which will maximize the overall profitability of Heil-Quaker in the judgment of its management. Affiant receives no compensation or employee benefits whatsoever from Whirlpool. His compensation from Heil-Quaker is based in part on the improvement or increase in sales and market penetration which are achieved by Heil-Quaker for the products it manufactures.

10. Heil-Quaker has no knowledge of the prices charged by its distributors to their customers of Whirlpool brand central heating and cooling equipment and retains no control over its distributors' resale prices.

Further affiant saith not.

AFFIDAVIT OF JAMES HOBBS

James Hobbs, being first duly sworn on oath, deposes and says:

1. Affiant is and has been since 1981 Southern Zone Sales Manager for Heil-Quaker Corporation. He has been employed by Heil-Quaker in that and other capacities since August, 1976, and has personal knowledge of the matters stated in this affidavit.

2. As Zone Sales Manager, affiant has the responsibility for appointing distributors for Whirlpool brand central heating and cooling equipment with the approval of his superiors, Arthur Mehuron, Heil-Quaker's National Sales Manager, and Charles L. Shattuck, Heil-Quaker's Vice President—Marketing. Affiant also has the responsibility for deciding whether to renew, non-renew or terminate existing distributors of this equipment.

3. Whirlpool Corporation has never been consulted nor has it participated in affiant's decisions to appoint, renew, non-renew or terminate distributors of Whirlpool brand central heating and cooling equipment.

4. Through the end of 1981, Heil-Quaker did not have any distributors for Whirlpool brand central heating and cooling equipment in the 13-parish area of southwestern Louisiana described in the complaint. The Houston Sales Division of Whirlpool Corporation, a distributor for Heil-Quaker, sold the Whirlpool brand to plaintiff, which was located in the 13-parish area. Plaintiff never had any sales agreement with Heil-Quaker for the purchase of the Whirlpool brand. Heil-Quaker's distributor for southeastern Louisiana was Mischer Wholesale, located in New Orleans, and its distributor for northern Louisiana was United Distributing of Shreveport, Louisiana. . . . .

5. In late 1981, Heil-Quaker management, including affiant, concluded that Heil-Quaker's market penetration for the Whirlpool brand was inadequate in the State of Louisiana and in the Houston Metropolitan Area. Heil-Quaker management, including affiant, desired to increase its market share for the Whirlpool brand substantially in the State of Louisiana by appointing at the earliest opportunity a single distributor which would distribute the Whirlpool brand in the entire state. Heil-Quaker management also desired the Houston Sales Division to concentrate its efforts in the Houston Metropolitan Area, a market which accounts for 11% of the air conditioning equipment sold in the United States and in which the Whirlpool brand had unsatisfactory market penetration.

6. To implement this decision, affiant decided not to renew Heil-Quaker's distributorship agreements with Mischer Wholesale and United Distributing of Shreveport effective as of April 30, 1982. Affiant also decided not to appoint plaintiff as Heil-Quaker's sole distributor of the Whirlpool brand for the State of Louisiana because plaintiff did not have existing distribution facilities in the northern part of the state and plaintiff indicated to affiant that it would not discontinue distributing the heating and cooling equipment line of a Heil-Quaker competitor if it were appointed a distributor for the Whirlpool brand. For these reasons, affiant initiated discussions in February 1982 with Solar Supply Company, located in New Orleans and with branch outlets located in Lake Charles, Baton Rouge, Monroe, Lafayette, Shreveport and Alexandria, Louisiana, and decided in April 1982 to appoint Solar as its sole distributor for the state because, in his judgment, Solar presented the maximum opportunity for increased market penetration for the Whirlpool brand in the state.

7. To implement this decision further, affiant suggested to Whirlpool's Houston Sales Division in December

1981 that sales to Houston customers in the 13-parish area and other outlying areas, including plaintiff, should be phased out by the middle of 1982. . . .

8. To implement this decision further, Heil-Quaker entered into a distributorship agreement with Solar effective as of April 21, 1982, . . . assigning Solar as Heil-Quaker's distributor for the entire State of Louisiana. At the time Heil-Quaker appointed Solar as its distributor, Heil-Quaker did not know the terms or provisions, if any, of the sales arrangements between the Houston Sales Division and plaintiff, it expected that plaintiff would be phased out by the Houston Sales Division by the end of June, 1982 as agreed, and it did not know that the Houston Sales Division had not advised plaintiff of the phase-out. . . . .

* * *

11. Neither Whirlpool Corporation nor any of its officers, directors or employees was consulted nor did they participate in the decision to change Heil-Quaker's distribution of Whirlpool brand central heating and cooling equipment in the States of Louisiana and Texas. The decision was made solely by affiant with the advice, recommendations and concurrence of Messrs. Shadduck, Mehuron, and Richard Rush, Heil-Quaker's Regional Sales Manager with responsibility for Zone 15 (the States of Texas and Western Louisiana).

12. As Zone Sales Manager, affiant has responsibility for determining the actual prices which will be charged to its distributors of Whirlpool brand central heating and cooling equipment, based upon the distributor prices supplied by Heil-Quaker's National Merchandise Manager, Frank Hartman, and taking into account competitive conditions in geographic zones within affiant's area. At all

times in 1981 and 1982, Heil-Quaker charged the same prices for Whirlpool brand central heating and cooling equipment supplied to all of its distributors in Zone 15. At all times in 1981 and 1982, Heil-Quaker charged the same price for the same merchandise it sold to Solar and to Whirlpool's Houston Sales Division. The sole exception to this uniform pricing was that lower prices were granted to individual distributors, including Solar, from time to time to meet the equally low prices of a competitor of Heil-Quaker. There has never been any discussion between Heil-Quaker and Solar concerning the prices at which the Houston Sales Division resold the Whirlpool brand to plaintiff.

13. Whirlpool Corporation has never been consulted and does not participate in any way in Heil-Quaker's decisions concerning prices, terms or conditions of sale for the Whirlpool brand to its distributors. Affiant has from time to time received requests for lower prices on certain products than its regular prices from distributors, including Whirlpool's Houston Sales Division and Solar, which affiant has refused to grant.

14. Heil-Quaker has no knowledge of or control over prices charged by its distributors to their customers, including associate distributors, and including prices charged by Whirlpool's Houston Sales Division and Solar to their customers.

* * *

Further affiant saith not.

AFFIDAVIT OF CHARLES G. PITNER

Charles G. Pitner, being first duly sworn on oath, deposes and says:

1. Affiant is and has been employed by the Houston Sales Division of Whirlpool Corporation since October 1961, has been its General Manager since September 1963 and has personal knowledge of the matters stated in this affidavit.

2. The Houston Sales Division is an operating division of Whirlpool Corporation and is not a separately incorporated entity.

3. The Houston Sales Division is engaged in the distribution of Whirlpool brand major household appliances (white goods) manufactured by Whirlpool and has also been appointed as distributor for the Houston, Texas area of Whirlpool brand central heating and cooling equipment manufactured by Heil-Quaker Corporation, a wholly-owned subsidiary of Whirlpool. The sale of Whirlpool brand central heating and cooling equipment by the Houston Sales Division accounted for approximately 6% of its total sales for all lines in 1981 and approximately 4% in 1982.

4. Prior to December 31, 1981, the Houston Sales Division sold Whirlpool brand central heating and cooling equipment to plaintiff, located in the 13-parish area of southwestern Louisiana described in the complaint, and to areas of Texas located outside the Houston Metropolitan Area. The Houston Sales Division decided to distribute Whirlpool brand central heating and cooling equipment in the 13-parish area and in the outlying areas of Texas by appointing sub-distributors, also known as associate distributors. Cooling and Heating, Inc. of Lake Charles was designated as distributor for 11 of the 13 parishes in 1973 and for two additional parishes in 1974. In December,

1980, plaintiff purchased the three branches of Cooling and Heating, Inc. located in Lake Charles, Lafayette, and New Iberia, Louisiana and became the Houston Sales Division's associate distributor for the 13-parish area for 1981. . . . Each sales agreement with both plaintiff and Cooling and Heating was for a term of one year and none of the agreements restricted the areas in which they were permitted to resell the Whirlpool brand. The Houston Sales Division also had four other associate distributors in 1981 covering San Antonio, Austin, Corpus Christi, Temple and Freeport, Texas.

* * *

7. The Houston Sales Division is operated as a separate profit center of Whirlpool Corporation and is expected to make a profit on its own operations. The Houston Sales Division accordingly takes into consideration its own operating costs and the prices it pays Heil-Quaker when it determines its resale prices to its customers, including associate distributors, for Whirlpool brand central heating and cooling equipment. Heil-Quaker is never consulted and does not participate in the Houston Sales Division's determination of its prices, terms and conditions of sale to its customers, including associate distributors such as plaintiff.

* * *

Further affiant saith not.